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IN THE
COURT OF APPEALS OF INDIANA

DERRY L. VAUGHN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 71A04-0608-CR-470
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-0604-FD-391

January 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Derry L. Vaughn ("Vaughn") appeals the seven-year sentence imposed upon him for Theft, a Class D felony,[1] enhanced because of his status as a habitual offender.[2] We affirm.

Issues

Vaughn presents two issues for review:

I. Whether he was properly adjudicated a habitual offender; and

II. Whether his sentence is inappropriate.

Facts and Procedural History

On March 10, 2006, in Mishawaka, Indiana, Kohl's loss prevention officer Steven Strantz ("Strantz"), observed Vaughn via the store's closed circuit surveillance system. Strantz saw Vaughn remove a pair of women's jeans from a hanger, turn them inside out, and conceal them by stuffing them into his own pants. Strantz ran outside the store and attempted to detain Vaughn, but was unable to do so.

Strantz contacted police and provided them with a videotape of Vaughn's activities inside the Kohl's store. Vaughn was later arrested. On April 7, 2006, the State charged Vaughn with Theft and alleged that he is a habitual offender.

On June 27, 2006, Vaughn was tried before a jury and found guilty of Theft. He then admitted to the truth of the habitual offender allegation. On July 27, 2006, Vaughn was

[1] Ind. Code § 35-43-4-2.

[2] Ind. Code § 35-50-2-8.

sentenced to three years imprisonment for Theft, enhanced by four years because of his status as a habitual offender. He now appeals.

I. Habitual Offender Adjudication

Vaughn contends that the habitual offender allegation should have been dismissed because one of the predicate felonies alleged in the instant habitual offender allegation, a Theft conviction in Cause No. 71D05-9403-CF-264, was also used to support a habitual offender adjudication in one of his prior criminal trials. He did not timely move to dismiss the habitual offender allegation[3] but now claims that it is fundamentally unfair to "allow the State to use whichever felonies it wishes, as many times as it wishes, to secure an unlimited number of enhancements." Appellant's Br. at 5. We perceive this to be a double jeopardy argument.

Habitual criminality is a status for the enhancement of punishment upon the conviction of an additional, substantive crime. Williams v. State, 430 N.E.2d 759, 768 (Ind. 1982). The purpose of the statute is to more severely penalize those persons whom prior sanctions have failed to deter from committing felonies. Id. The Indiana Supreme Court has held the doctrines of double jeopardy and collateral estoppel are inapplicable to habitual offender proceedings. See Mers v. State, 496 N.E.2d 75 (Ind. 1986), habeas corpus denied, 472 U.S. 1019 (1985); Baker v. State, 425 N.E.2d 98 (Ind. 1981). "Because the habitual offender statute does not create new or separate offenses and the habitual offender proceeding does not deal with the underlying facts on the substantive charge, the use of prior

[3] Vaughn wrote a letter to the trial court questioning the propriety of twice using the same predicate felony to establish his recidivist status.

convictions at more than one habitual offender proceeding does not constitute double jeopardy. . . . There are no constitutional or collateral estoppel barriers to prevent the state from exacting that punishment [of enhancement] each time a different felony is committed as long as the prior convictions do still exist." Baker, 425 N.E.2d at 101. See also Williams, 430 N.E.2d at 768 (holding that it was "not error for the trial court to sentence [Williams] under the habitual offender count [when] he had previously been sentenced as an habitual offender at a prior trial on an unrelated murder wherein the state alleged and proved the same two underlying felonies as were used in the instant trial.") Accordingly, Vaughn demonstrates no violation of double jeopardy principles.

II. Appropriateness of Sentence

Vaughn next argues that his sentence is inappropriate.[4] In particular, he claims that his criminal history, consisting primarily of Class D felonies,[5] misdemeanors and juvenile adjudications, does not support a near-maximum sentence.

Indiana Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

Indiana Code Section 35-50-2-7 provides in pertinent part: "A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3)

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[4] Inexplicably, the State responds with an argument that Vaughn's sentence will not be reversed unless it is manifestly unreasonable. The manifestly unreasonable standard was embodied in a version of Indiana Appellate Rule 7(B) in effect prior to January 1, 2003.

[5] Vaughn's was twice convicted of Escape, a Class C felony.

years, with the advisory sentence being one and one-half (1 1/2) years." Indiana Code Section 35-50-2-8(h) provides in pertinent part: "The court shall sentence a person found to be a habitual offender to an additional fixed term that is not less than the advisory sentence for the underlying offense nor more than three (3) times the advisory sentence for the underlying offense." Accordingly, Vaughn's seven-year sentence is within statutory parameters, and is six months less than the maximum he could have received.

The nature of the instant Theft offense is unremarkable. However, Vaughn has a prolonged criminal history indicating that prior rehabilitative efforts have failed. The Presentence Investigation Report reveals: 1978 - Criminal Conversion and Criminal Trespass convictions; 1979 - Criminal Conversion and multiple offenses of Driving without a License; 1980 - three Theft convictions and one Attempted Theft conviction; 1983 - one Theft conviction; 1984 – two Theft convictions; 1985 – Escape and Battery to a Police Officer convictions; 1987 – one Robbery conviction; 1988 - Theft, Battery, Intimidation and Escape convictions; 1994 – one felony Theft conviction, one misdemeanor Theft conviction, and two Michigan convictions for Retail Fraud; 1995 – one Possession of Cocaine conviction and three Michigan convictions for Retail Fraud; 1996 – one Receiving Stolen Property conviction; 1997 – one Criminal Conversion conviction; 1998 – two Battery convictions, one Possession of Marijuana conviction, two Criminal Conversion convictions and one conviction for Theft, enhanced due to habitual offender status; 1999 – one Obstruction of Justice conviction and one Theft conviction; 2002 – two Michigan convictions for Retail Fraud; 2003 – one Battery conviction and one Retail Fraud conviction; 2004 – one

Possession of Marijuana conviction and one Criminal Conversion conviction (minor traffic offenses omitted). Furthermore, Vaughn has violated probation on multiple occasions. Various sentence modifications have not deterred him from criminal activity. In light of the failure of prior rehabilitative efforts, we do not find his seven-year sentence to be inappropriate.

Affirmed.

VAIDIK, J., and RILEY, J., concur.